PROFESSOR DR HJ MOHAMMED FEIZAL ABDULLAH & ANOR

v.

HARVENDER JEET KAUR KAKA SINGH & ANOR

HIGH COURT MALAYA, KUALA LUMPUR
HARMINDAR SINGH DHALIWAR JC
[CIVIL SUIT NO: S3-23-123-2001]
31 JULY 2009

TORT: *Negligence - Death of baby - Whether inadequate arrangements made to monitor baby - Whether baby was in the exclusive care, control and management of plaintiffs - Cause of death - Whether within peculiar knowledge of plaintiffs - Issue of causation - Failure to provide medical evidence on how death occurred and if delay in attending baby led to his demise - Whether first defendant failed on balance of probabilities to prove negligence*

CIVIL PROCEDURE: *Action - Suit for defamation - Defence and counterclaim - Negligence - Whether inadequate arrangements made to monitor baby - Whether baby was in the exclusive care, control and management of plaintiffs - Cause of death - Whether within peculiar knowledge of plaintiffs - Issue of causation - Failure to provide medical evidence on how death occurred and if delay in attending baby led to his demise - Whether first defendant failed on balance of probabilities to prove negligence*

TORT: *Negligence - False imprisonment - Whether first defendant wrongfully detained in premises - Whether first defendant failed to notice exit doors due to her agonized situation - Whether claim for wrongful detention could succeed*

On 7 February 1996 the first defendant gave birth to a healthy baby boy ('the baby'). The baby was delivered in the premises of the second plaintiff, a private hospital run by the first plaintiff who was a consultant surgeon. Just after midnight on the said date, the baby developed breathing difficulties. According to the first defendant, there was no doctor or nurse around but one Abdul Azeez, a dispenser, who performed some sort of suction on the baby. After Abdul Azeez attended to the baby, he left at about 3.30am to look for the first plaintiff. The baby's condition became worse. In a

A frantic state, the first defendant took the baby downstairs to find assistance and found no one and to compound her predicament, found the premises locked. Her sister in law arrived 15 minutes later and in what must have been a moment of sheer desperation, the first defendant tried to push the baby through the grill but was
B unsuccessful. At about 5.20am, the first plaintiff arrived at the hospital. Despite attempts at resuscitation, the baby died at 6am. The cause of death was listed as 'Respiratory Distress Syndrome.' The events that transpired were reported prominently in all the major newspapers but more so in the New Straits Times (the second
C defendant). The plaintiffs then commenced this suit against the defendants for defamation. In return, the first defendant filed a defence and counterclaim for false imprisonment and negligence, which was dealt with in this court.

D **Held (dismissing first defendant's counterclaim):**

(1) It was the first defendant's evidence that the doors of the premises were all locked. On the other hand, the first plaintiff testified that although the front door grill was locked, there
E were always keys hung at the side. This was confirmed by SP2, a nurse with the second plaintiff, who said there was a key at the side of the front door. Considering the circumstances, this court was unable to see how the first defendant could have claimed that she was wrongfully detained.
F The exit doors could be opened from the inside though not from the outside. It was more than likely that as the first defendant had just given birth and as she was in agony at the deteriorating condition of her newborn, she failed to notice the exit doors or the keys to the front door. Considering all the
G circumstances and the facts involved in this case, the first defendant's claim for wrongful detention could not succeed. (paras 7 & 8)

(2) The baby was by all accounts born healthy and without incident. In the ordinary course of things, a healthy baby does
H not some hours later cease to live. There was also no explanation as to what caused the baby to develop breathing difficulties and its subsequent demise. The issue of concern was whether the baby was in the sole management and control of the plaintiffs. This question was of considerate importance
I because if it was the case that the baby was in the sole control of the plaintiffs, then the cause of the damage or injury or death as in this case, may peculiarly be within their knowledge.

In such a case, it would be patently unfair for the person suffering the injury to have to provide the explanation for the damage, injury or death. However, in the instant case, there was undisputed evidence that the baby was handed over to the first defendant's mother-in-law at her insistence. It seemed therefore that the baby was not in the exclusive care, control and management of the plaintiffs. As such, it could not be said that the cause of death was within the peculiar knowledge of the plaintiffs. For this reason, an inference of negligence through *res ipsa loquitur* did not bite in this case. (para 17)

(3) Although there were obviously inadequate arrangements to monitor the baby resulting in delay in attending to the baby when he had breathing difficulties, this by itself was insufficient. There must also be evidence that it was this failure that caused the death of the baby. This issue of causation was therefore critical. It could sometimes be the case that injury or death could be due to several potential causes and it would be unfair to impose liability on a medical practitioner if the cause of injury or death was not attributable to him or her. Since the onus to prove causation was on the first defendant herein, it was vital to call in medical evidence to prove the same. In the instant case, medical evidence should have been adduced to how such a death could have occurred, and crucially, if any delay in attending to a baby in such a case would have led to the baby's demise. Since this was not provided, the first defendant had failed on a balance of probabilities to prove negligence on the part of the plaintiffs. The first defendant's claim in this regard must therefore fail. (para 18)

Case(s) referred to:
Barnet v. Chelsea & Kensington Hospital Management Committee [1968] 1 All ER 1068 ***(refd)***
Bennet v. Chemical Construction (GB) Ltd [1971] 1 WLR 157 ***(refd)***
MA Clyde v. Wong Ah Mei & Anor [1970] 1 LNS 73 FC ***(refd)***
Scott v. London and St Katherine Docks Co [1865] 3 H & C 598 ***(refd)***
Teoh Guat Lai v. Ng Hong Guan [1998] 4 CLJ 416 CA ***(refd)***
Wilsher v. Essex Area Health Authority [1988] 1 All ER 871 ***(refd)***

Legislation referred to:
Evidence Act 1950, ss. 101, 102, 103

Other source(s) referred to:
Clerk and Lindsell on *Torts*, 18th edn, p 410

For the plaintiff - M Manoharan; M/s M Manoharan & Co
For the 1st defendant - David Gurupatham; M/s David Gurupatham & Koay

Reported by Suhainah Wahiduddin

JUDGMENT

Harmindar Singh Dhaliwar JC:

[1] On 7 February 1996 at about 5.30pm, the 1st defendant gave birth to a healthy baby boy later named Babypal Singh ("the baby"). The baby was delivered in the premises of the 2nd plaintiff which was a private hospital run by the 1st plaintiff who was a consultant surgeon. This joyous occasion was however short-lived as what unfolded next is a tragic story, the events of which appeared extensively in the newspaper managed by the 2nd defendant. The story is as follows.

[2] Just after midnight on 7 February 1996, the baby developed breathing difficulties. When the 1st defendant asked for a doctor, she was told that he was not around. There was also no nurse at that time although the plaintiffs dispute this. There was one person who was around. The 1st defendant says that he was just a dispenser. This person as could be gathered from the evidence was one Abdul Azeez. He performed some sort of suction on the baby. He was not called to give evidence. Although the 1st plaintiff asserted that this Abdul Azeez was qualified, no evidence of his qualifications was given.

[3] It then transpired that this Abdul Azeez had called the 1st plaintiff around 3.30am Abdul Azeez then leaves the premises and arrives at the 1st defendant's house at about 5am. The 1st plaintiff then arrives at the hospital at 5.20am. Despite attempts at resuscitation, the baby died at 6am. The cause of death was listed as "Respiratory Distress Syndrome". But that is not the whole story.

[4] Prior to this, after Abdul Azeez had attended to the baby and then left to look for the 1st plaintiff, the baby's condition was getting worse. In a frantic state, the 1st defendant took the baby downstairs to find assistance. She found no one and to compound her predicament, she found the premises locked. She managed to break open the lock on a phone and called her sister-in-law who

arrived 15 minutes later. In what must have been a moment of sheer desperation, the 1st defendant tried to push the baby through the grill but was unsuccessful. Soon after, Abdul Azeez returned followed by the 1st plaintiff a little later. As it turned out, all the efforts were in vain. The events that transpired were reported prominently in all the major newspapers but more so in the New Straits Times and the Malay Mail.

[5] The plaintiffs then commenced this suit against the defendants for defamation. In return, the 1st defendant filed a defence and counterclaim for defamation, false imprisonment and negligence. The claim of the plaintiff was however struck out on 18 September 2008. An application for reinstatement of the plaintiff's claim was dismissed on 3 April 2009. The plaintiffs have filed an appeal to the Court of Appeal which appeal is pending.

[6] In the circumstances, only the counterclaim by the 1st defendant was left to be decided by this court. However, the claim for defamation was abandoned at the outset of the trial. The remaining claims of wrongful detention and negligence were considered as follows.

Claim For Wrongful Detention

[7] The 1st defendant claimed that she was wrongfully detained in the plaintiff's premises for a period of about 5 1/2 hours. Her evidence was that she saw only three doors and they were all locked. On the other hand, the 1st plaintiff testified that although the front door grill was locked, there are always keys hung at the side. This was confirmed by SP2, a nurse with the 2nd plaintiff, who said there was a key at the side of the front door. Apart from this, there were emergency exits that could be easily identified as they carried the "exit" sign.

[8] Considering these circumstances, I am unable to see how the 1st defendant could have claimed that she was wrongfully detained. The exit doors could be opened from the inside though not from the outside. I think it was more than likely that as the 1st defendant had just given birth and as she was in agony at the deteriorating condition of her newborn, she failed to notice the exit doors or the keys to the front door.

[9] In this kind of situation, the court must adopt a pragmatic approach. Whether there was wrongful detention or not must depend on the specific circumstances of each case, the situation of the individual and the context in which the individual finds himself or herself.

[10] Considering all the circumstances and the facts involved in this case, the 1st defendant's claim for wrongful detention cannot succeed.

Claim For Negligence

[11] In this case, the evidence adduced clearly shows that inadequate arrangements were made to monitor the 1st defendant and her baby after the birth. The fact that there was only Abdul Azeez whose qualifications are unknown is quite unacceptable. The 1st plaintiff knowing this when he was contacted at 3.30am should have come immediately instead of at 5.20am as he eventually did.

[12] In the normal case, before any consideration as to damages can arise, it is necessary to prove that the breach of duty was the cause of the injury complained of and that the injury in question was foreseeable. The burden rests on the claimant to show that he or she would not have suffered the injury or damage if the medical practitioner had not been negligent. In other words, the claimant must prove on balance of probabilities that it was the negligence of the medical practitioner rather than some other factor which caused the injury.

[13] However, there may be cases where an inference of negligence may arise from the injury itself and its surrounding circumstances by recourse to maxim known as *res ipsa loquitur*. In the case of *Scott v. London and St Katherine Docks Co* [1865] 3 H & C 598 where this rule probably emanates, the plaintiff, a customs officer, was injured by some sugar bags falling on him in the defendant's warehouse. In a classic exposition of the maxim, Erle CJ affirmed as follows:

> There must be some reasonable evidence of negligence. But where the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from want who care

[14] Now, two questions arise as to whether the maxim can be relied upon in the instant case. The first question is whether the maxim *res ipsa loquitur* must be pleaded and the second, whether the baby was under the exclusive care of the plaintiffs. A

[15] With regards to the first question, it should be observed that the principle of *res ipsa loquitur* is essentially a rule of evidence regarding onus of proof. In any trial, although the burden of proof remains throughout on the plaintiff, it is not uncommon for the burden of introducing evidence, or sometimes referred to as the onus of proof, to shift from one side to the other depending upon the evidence that is introduced (ss. 101, 102, and 103 Evidence Act 1950). In a similar way, a case of *res ipsa loquitur* merely shifts the burden of introducing evidence to explain how the impugned incident occurred without negligence on the part of the party upon whom negligence is alleged. Furthermore, it is also trite that pleadings require only a disclosure of material facts not evidence. For these reasons, I am more inclined to hold that a failure to plead the maxim in this case does not preclude the 1st defendant from raising the same at the end of the trial (see also *Bennet v. Chemical Construction (GB) Ltd* [1971] 1 WLR 1571 and *Teoh Guat Lai v. Ng Hong Guan* [1998] 4 CLJ 416 CA). B C D E

[16] On the second question, the case of *Scott v. London and St Katherine Docks*, *supra* suggests that three conditions must be satisfied before *res ipsa loquitur* applies. These were summarized in Clerk and Lindsell on *Torts*, 18th edn at p. 410 as follows: F

(1) the occurrence is such that it would not have happened without negligence; and

(2) the thing that inflicted the damage was under the sole management and control of the defendant, or of someone for whom he is responsible or whom he has a right to control; G

(3) there is no evidence as to why or how the occurrence took place; if there is such evidence, then appeal to *res ipsa loquitur* is inappropriate for the question of the defendant's negligence must be determined on such evidence. H

[17] In the present case, the baby was by all accounts born healthy and without incident. In the ordinary course of things, a healthy baby does not some hours later cease to live. There was also no explanation as to what caused the baby to develop breathing I

difficulties and its subsequent demise. The issue of concern is whether the baby was in the sole management and control of the plaintiffs. This question is of considerable importance because if it was the case that the baby was in the sole control of the plaintiffs, then the cause of the damage or injury or death as in this case, may peculiarly be within their knowledge (see *MA Clyde v. Wong Ah Mei & Anor* [1970] 1 LNS 73). In such a case, it would be patently unfair for the person suffering the injury to have to provide the explanation for the damage, injury or death. However, in the instant case, there was undisputed evidence that the baby was handed over to the 1st defendant's mother-in-law at her insistence. It seems therefore that the baby was not in the exclusive care, control and management of the plaintiffs. As such, it cannot be said that the cause of death was within the peculiar knowledge of the plaintiffs. For this reason, an inference of negligence through *res ipsa loquitur* does not bite in this case.

[18] That being the case, the burden remained on the 1st defendant to prove breach of duty, injury and causation on a balance of probabilities. Although we have a case here where there were obviously inadequate arrangements to monitor the baby resulting in delay in attending to the baby when he had breathing difficulties, this by itself is insufficient. There must also be evidence that it was this failure that caused the death of the baby. This issue of causation is therefore critical. It may be tempting to suggest and even accept that the facts as proved raise an inference of negligence on the part of the plaintiffs. I say tempting because it may appear plausible at first blush that the baby could have been saved if medical assistance had come sooner. However, our system of justice requires proof and not conjecture. Although it may on occasions appear that the hurdle of causation is set too high in medical cases, it can sometimes be the case that injury or death could be due to several potential causes and it would be unfair to impose liability on a medical practitioner if the cause of injury or death is not attributable to him or her. In *Wilsher v. Essex Area Health Authority* [1988] 1 All ER 871, the infant plaintiff who was born prematurely was given excess oxygen. The infant developed retrolental fibroplasia which resulted in blindness. This retinal condition could have been caused by excess oxygen but it also occurred in premature babies. On appeal it was held by the House of Lords as follows:

Where a plaintiff's injury was attributable to a number of causes, one of which was the defendant's negligence, the combination of the defendant's breach of duty and the plaintiff's injury did not give rise to a presumption that the defendant had caused the injury. Instead the burden remained on the plaintiff to prove the causative link between the defendant's negligence and his injury, although that link could legitimately be inferred from the evidence. Since the plaintiff's retinal condition could have been caused by any number of different agents and it had not been proved that it was caused by the failure to prevent excess oxygen being given to him the plaintiff had not discharged the burden of proof as to causation.

[19] Another example is where the injury or death would have occurred in any event. In *Barnet v. Chelsea & Kensington Hospital Management Committee* [1968] 1 All ER 1068, three night watchmen went to the casualty department of the defendant's hospital. They complained of vomiting after drinking some tea. The doctor at the casualty department told them to go home without examining them. They went away but some hours later, one of them died from what was found to be arsenical poisoning. There was evidence that since arsenical poisoning was rare, even if the deceased had been examined and admitted to hospital and treated, there was little or no chance that the only effective antidote would have been administered to him before the time at which he died.

[20] It was held that although the hospital casualty doctor was negligent in failing to see and examine the deceased, it was not proven on a balance of probabilities that it was the defendants' negligence which caused the patient's death and the claim was dismissed.

[21] What these cases illustrate is that since the onus to prove causation was on the plaintiff (1st defendant in our case), it was vital to call in medical evidence to prove the same. In the instant case, medical evidence should have been adduced to show how such a death could have occurred, and crucially, if any delay in attending to a baby in such a case would have led to the baby's demise. Since this was not provided, the 1st defendant has failed on a balance of probabilities to prove negligence on the part of the plaintiffs. The 1st defendant's claim in this regard must therefore fail.

A **[22]** In the result and with much regret, the 1st defendant's counterclaim is dismissed. In view of the circumstances of this case, I do not propose to make any order as to costs. Finally, although this may be of little consolation to the 1st defendant, my sympathies are with her. The profound joy of a newborn followed
B almost instantly by the dreadful proceedings which led to the sudden inexplicable demise are events which I imagine will stay long in her mind.

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